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PETITION FOR REHEARING.

Supreme Court of the United States

OCTOBER TERM, 1904.

No. 99.

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SUPREME COURT U

HENRY MUHLKER,

Plaintiff in Error,

vs.

THE NEW YORK AND HARLEM RAILROAD COMPANY AND THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY,

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Supreme Court of the United States.

HENRY MUHLKER,
Plaintiff-in-Error,

vs.

THE NEW YORK AND HARLEM RAILROAD COMPANY

and

THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

October Term, 1904. No. 99.

TO THE SUPREME COURT OF THE UNITED STATES:

The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company do respectfully petition the Court that number ninety-nine of the present term be reheard—

upon the following grounds:

FIRST.—The Court has not yet been told that New York has passed an act by which she was to pay, through her Court of Claims, all "*damages alleged to have been caused to*," "*property abutting on Park avenue*," "*by the acts "and operations performed and carried out, pursuant "to" the act of 1892* by the Board created by that Act, except "damages for which any railroad corporation "or corporations may, either at law or in equity, be "liable."

The Court has held in *Chicago* v. *Taylor* (125 U. S., 161)—and several times since, that these words mean, among other things, *all* the lessening in the value of the property—which is exactly the thing for which the plaintiff in error has got a judgment, only much more completely so—since his judgment is for the lessening of the value which was caused *only* by the cutting off *of light and air* (R., 25)—whereas by this act New York pays for *all* damages.

And as by the railroad law and the Code of Civil Procedure of New York, the petitioners are bound to *pay* Mr. Muhlker for any "easement" of his which they take, the full amount of the damage which that taking may do to him, to be ascertained by a regular judgment of the Supreme Court of New York, which is New York's only court of *general* jurisdiction:—

The pertinent portions of the Railroad Law of the Code are quoted below and *perhaps* counsel can tell the Court *in what words* New York could "pass" "any" "law" which would less impair "the obligation of" "contracts" which Mr. Muhlker may suppose he has got, or which could more thoroughly provide for "due process of law" in the taking of any of his property.

That much of the railroad law and a considerable portion of the Code of Civil Procedure were not re-written into the act of 1892 will perhaps not give the Court much trouble. A word will be said of it later.

Of course, the only Federal question raised below was that *the Act of 1892* was unconstitutional (R, c).

The petitioners do respectfully submit that the effect of the Court's judgment is to compel *them* to pay not only what Sovereign New York has said they need not pay, *but what she has agreed to pay herself*, and for the paying of which she has provided an adequate source—namely, her own treasury, and it may be that this was what was meant by the Court of Appeals of New York,

when, speaking through its Chief Judge, and having just held that it was New York which had done the damage and which therefore ought to pay for it, said (R., 170): "Undoubtedly the State * * * has the power to "authorize ascertainment of the damages to the abutting "owners through its Court of Claims, and to provide for "their payment, *and it may be well that it would be equit-"able for it to do so.*"

Briefly, then, the petitioners do respectfully submit this. Assuming the broad principle that where *any body*, by the doing of *any thing*, for *the public*, is hurt in a money way, *he ought to be fully paid for it*,—in this case, New York *provided for that payment*, and perhaps in as little of a blundering way as is possible—under her form of government.

SECOND.—The *tremendous* character of the decision.

Never before has the Court held anything about the words in the Constitution, that no state shall "*pass any law*" "impairing the obligation of contracts," unless the case were about a *written law*—a *legislative* act or a *constitution*, and about *such* legislative acts, it has *twice* held that where there were *two* acts, the language of which was *similar* though not *identical*, the state court was not bound to give to the one the same construction which it had, before, given to the other.

Wood *v.* Brady, 150 U. S., 18, 22.
Bacon *v.* Texas, 163 U. S., 207, 226.

Here the state of things is this:

The *words* of Poillon's deed, under which Mr. Muhlker claims, were construed, by the Court of Appeals of New York in *Kerr's* case, *against* Mr. Muhlker's contention and in favor of the contention of the petitioners:

(*People* v. *Kerr*, 27 N. Y., 188.)

Then came the *Story* and *Lahr* cases, in which, in an entirely different contract, *similar* but not *identical*

words were construed another way. In this state of things Mr. Muhlker bought his land. *Now*, the State court in construing Muhlker's (Poillon's) deed, containing the identical words contained in the Kerr deed, and construing also the effect and extent of the rights acquired by the defendants and the acts of the Legislature and of the Municipality in respect thereto, holds against Muhlker; and it is this *decision* of the court of appeals of New York, which the Court, in the opinion, now holds to be a *law*, *passed* by New York, which impairs the obligation made by Mr. Muhlker's deeds—and not the act of 1892.

The petitioners respectfully submit that they can easily show that, under the doctrine of the prevailing opinion, *any* case of ejectment or simple trespass, and *any* case of *any* "contract" where the meaning of words is to be determined by the *Common Law* will come straight to the Court.

> Knox *v.* Exchange Bank, 12 Wall., 379, 383; quoted in Central Land Co. *v.* Laidley, 159 U. S., 103, 110.

THIRD.—It is said by Mr. Justice Holmes, in his opinion, that the Court is extending to the present case the principle of *Gelpcke* v. *Dubuque*.

In that case there was full jurisdiction because of the citizenship. In the later case of *Railroad Co.* v. *McClure*, (10 Wall., 511, 515), the *same* matter came to the Court by a writ of error bringing up the record of the Supreme Court of Iowa, in which case the writ of error was dismissed for the reason that the Court had no jurisdiction of the matter when it was brought up in that way, and in *Central Land Co.* v. *Laidley* (159 U. S., 103), the Court, speaking by Mr. Justice Harlan, and then, giving the history of those cases, said that decision was right. If that were so, of course *this* writ of error must be dismissed.

The petitioners, however, have no wish to succeed upon any such ground. If the Court, upon all the merits, says they *should* pay they will pay, and this matter is mentioned only in view of what has been said above as to the reading of the Act of 1892, together with the railroad act, and the Code. If the judgment is to go upon the ground that they are not all one law, then the petitioners would ask for the dismissal of the writ of error, because there would be still time to put all the acts into one, *besides* it is quite as well New York should know that, when she chooses to give a simple command to one of her creatures, she must print into it the most of her railroad law and a very considerable portion of her code of civil procedure.

And the petitioners do respectfully ask for the rehearing of this case, together with numbers 202 and 203, which present the same questions.

And as in duty bound will ever pray.

IRA A. PLACE,
THOMAS EMERY,
Of Counsel.

We certify that in our opinion the foregoing petition for rehearing is well founded.

IRA A. PLACE,
THOMAS EMERY,
Of Counsel.

We append the opinions, section 7 of the Railroad Law, section 3359 of the Code of Civil Procedure, the act above referred to and a few observations thereon, and respectfully ask for the reading thereof.

IRA A. PLACE,
THOMAS EMERY,
Of Counsel.

Observations on the Act of 1901.

The trial court found in this case that Mr. Muhlker's property had been lessened in value by "a continuous "trespass upon his easements of light and air," and gave judgment for the lessening in value of the premises "*solely* in consequence of *said* trespass (obstruction of "light and air) and aside from any other causes." (R. 25.)

That this obstruction of the light and air comes from the structure and *not* from the running of the trains, is apparent from the opinion of the court, and follows from the fact that the defendants had the *right* to run their trains. Both the *Story* and the *Lahr* cases had so held. *Fobes* v. *R. W. & O. Rd. Co.*, 121 N. Y. 505, 515).

But the structure was built by the State and not by the *defendants*. This the trial court *finds* as a fact (R. 24), and the Court of Appeals of New York so held, and reversed (R. 167, 170), holding that the change was for the benefit of the public *solely* and not at all for the benefit of the defendants, and that the *State* ought to pay.

By the General Railroad Act and the Code of Civil Procedure the defendants were required to *pay* for all "*easements*" which they took from anybody, and all other interests in real estate beside—to *pay before* the taking.

The state, by the Act of 1892, provided that the cost of constructing the viaduct and of making the physical changes in the avenue should be borne by the railroad company and by the city; by the Act of 1901 the state provided that there should be paid from its own treasury all damages caused to abutting property by "the acts and operations" of the board created by the act which the owners of the abutting property could not recover from the railroad companies.

With these statutes all before it the Court of Appeals held that the defendants were *not* liable and intimated that *the State ought to pay*.

In the Court of Appeals the plaintiff in error raised two Federal questions and but two, nor is any other raised anywhere in the record.

These two questions were that the *Act of 1892 is unconstitutional* because *first*, it does not provide for *notice*, and *secondly*, because it does not provide for *compensation* for the taking of these easements (R. 77, 78; Plaintiff's Brief, p. 11–12).

The court now holds, *not that the Act of 1892* is unconstitutional, but that *the decision of the Court of Appeals* is unconstitutional.

We respectfully submit that there can be no question and *no argument even* about the constitutionality of the act of 1892.

Through the Railroad Law and the Code of Civil Procedure it *compels* full notice and full payment by the companies for the taking of all and any "*easements*":—*these* easements, of course, if there be such as the plaintiff claims: and through the Act of 1901 it compels payment from the State's treasury "*for all damages*" which the property of the plaintiff may have suffered.

We respectfully submit that there is not any Federal question, and that the acts have provided for payment to Mr. Muhlker anyway.

ACT OF 1901.

CHAP. 729.

"AN ACT conferring jurisdiction upon the court of claims "to hear, audit, and determine the alleged claims of "certain owners of real property in New York city "for damages alleged to have been caused to said "property by the operations carried out pursuant to "chapter three hundred and thirty-nine of the laws "of eighteen hundred and ninety-two.

Became a law, May 11, 1901, with the approval of the Governor. Passed, three-fifths being present.

"The People of the State of New York, represented in "Senate and Assembly, do enact as follows:

"SECTION 1. Jurisdiction is hereby conferred upon the "court of claims to hear, audit, and determine the alleged "claims of persons who now own or heretofore have owned "real property abutting on Park avenue, in the Borough "of Manhattan, city of New York, between One Hundred "and Sixth street and the Harlem river, or the heirs, ex- "ecutors, administrators, or assigns of said persons, for "damages alleged to have been caused to said property by "the acts and operations performed and carried out, pur- "suant to chapter three hundred and thirty-nine of the "laws of eighteen hundred and ninety-two, and the acts "amendatory thereof and supplemental thereto, in so far "as said acts and operations were performed or carried "out by, or under the direction or superintendence of, the "public board created by said act, namely, the board for "the Park avenue improvement above One Hundred and "Sixth street, and the court of claims is authorized to "make awards and to render judgments therefor against "the state and in favor of said claimants; provided, how- "ever, that this act shall not be construed as conferring "upon the court of claims jurisdiction to award any dam- "ages for which any railroad corporation or corporations "may, either at law or in equity, be liable.

"SECTION 2. No award shall be made or judgment ren- "dered herein against the state unless the facts proved

" shall make out a case against the state, which would
" create a liability were the same established in evidence
" in a court of law or equity against an individual or cor-
" poration; and in case such liability shall be satisfactorily
" established, then the court of claims shall award to the
" claimants such sums as shall be just and equitable, and
" shall render judgments for the same, notwithstanding
" the lapse of time since the accruing of damages, pro-
" vided the said claims are filed with the court of claims
" within one year after the passage of this act.

" SECTION 3. This act shall take effect immediately."

Railroad Law of New York.

"ACQUISITION OF TITLE TO REAL PROPERTY.

"§ 7. All real property, required by any railroad corporation for the purpose of its incorporation, shall be deemed to be required for a public use. If the corporation is unable to agree for the purchase of any real property, or of any right, interest or *easement* therein, required for such purpose, or if the owner thereof shall be incapable of selling the same, or if after diligent search and inquiry the name and residence of such owner cannot be ascertained, *it shall have the right to acquire title thereto by condemnation.* It shall also have such right in the following cases:

"1. Where title to real property has been acquired, or attempted to be acquired, and has been found to be invalid or defective.

"2. Where its railroad shall be lawfully in possession of a lessee, mortgagee, trustee or receiver, and additional real property shall be required for the purpose of running or operating such railroad.

"3. Where it shall require *any further rights to lands or the use of lands* for switches, turnouts or for filling any structures of its road, or for constructing, widening or completing any of its embankments or roadbeds, by means of which greater safety or permanency may be secured, and such lands shall be contiguous to such railroad and reasonably accessible to the place where the same are to be used for such purpose or purposes.

"4. Where it shall require any further right to lands or to the use of lands for the flow of water occasioned by railroad embankments or structures now in use, or hereafter rendered necessary, *or for any other purpose necessary for the operation of such railroad*, or for any right to take and convey water from any spring, pond, creek or river to such railroad, for the uses and purposes thereof, together with the right to build or lay aqueducts or pipes for the purpose of conveying such water, and to take up, relay and repair the same,

" or for any right of way required for carrying away or " diverting any water, stream or floods from such rail- " road for the purpose of protecting its road *or for the* " *purpose of preventing any* embankment, excavation or " *structure of such railroad from injuring the property* " *of any person who may be rendered liable to injury* " *thereby.*

" Waters commonly used for domestic, agricultural or " manufacturing purposes shall not be taken by condem- " nation to such an extent as to injuriously interfere with " such use in future. No railroad corporation shall have " the right to acquire by condemnation any right or ease- " ment in or to any real property owned or occupied by " any other railroad corporation, except the right to " intersect or cross the tracks and lands owned or held " for right of way by such other corporation, without " appropriating or affecting any lands owned or held for " depots or gravel-beds."

Code of Civil Procedure.

"Sec. 3359. WHEN PROCEEDINGS PRESCRIBED IN THIS TITLE TO BE TAKEN.

"Whenever any person is authorized to acquire title to "real property, for a public use *by condemnation*, the pro- "ceeding for that purpose shall be taken in the manner "prescribed in this title."

By Sec. 3375 possession of the property taken can only be had after payment of the compensation awarded by the judgment.

Supreme Court of the United States.

No. 99.—October Term, 1904.

Henry Muhlker, Plaintiff in Error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.	In Error to the Supreme Court of the State of New York.

[April 10, 1905.]

Plaintiff sues to enjoin the use of a certain elevated railroad structure on Park avenue, in the city of New York, in front of his premises, unless upon payment of the fee value of certain easements of light, air and access and other rights appurtenant to his premises. He also prays damages for injury sustained from the year 1890 to time of trial.

From the evidence in the case the Supreme Court found that the plaintiff had been since 1888 the owner of a lot of land on the northwesterly corner of Park Avenue and One Hundred and Fifteenth Street, on which he, in 1891, erected a five-story brick building, and that there were appurtenant to said lot and building "certain easements of light, air and access in and over said Park Avenue, in front of said premises." The defendant, The New York

and Harlem Railroad Company, is and was during all the times mentioned herein the owner of a railroad and railroad structures in Park Avenue, in front of such premises, and the New York Central and Hudson River Railroad Company is the lessee of said railroad and structures under a lease dated April 1, 1873, for a term of four hundred and one years; that said railroad, prior to 1872, was operated on two tracks laid upon the surface of said avenue and along the center thereof, in front of said premises.

In pursuance of chapter 72 of the Laws of 1872 certain changes were made in the railroad in front of said premises, between the years 1872 and 1874, whereby the number of tracks was increased from two to four and were laid along the center of the avenue, and at the south line of said premises were at the surface, and at the north line of said premises were laid in a trench about five and a half feet below the surface. In front of said premises the railroad was bounded on both sides by masonry walls about three feet high above the surface, and cut off access across said avenue immediately in front of said premises.

The New York Central and Hudson River Railroad Company in 1872 operated its trains over the railroad in front of said premises, and continued to do so until February 16, 1897.

The other facts are expressed in the finding of the court as follows:

> "FOURTH.—That pursuant to chapter 339 of the Laws of 1892, there was constructed along Park avenue, in front of plaintiff's said premises, between April, 1893, and March, 1896, a new permanent elevated railroad structure of iron and steel; that said railroad in front of plaintiff's said premises is about 59 feet wide and consists of four tracks laid on a solid roadbed, having a mean elevation of about 31 feet above the surface of said avenue, which roadbed is girded along the sides and in the center by solid iron girders, each 7 feet and 4 inches high, and is

supported by iron columns, of which there are six directly in front of plaintiff's said premises; and that the work of constructing said permanent elevated railroad structure was done under the supervision of a board created by said act.

"FIFTH.—That the defendant The New York Central and Hudson River Railroad Company laid the tracks on said permanent elevated railroad structure about March, 1896, and from said date down to February 16th, 1897, operated thereon in front of said premises trains of cars drawn by steam engines for the carriage of freight and material used in the construction of said structure, for which service said defendant was paid; that said defendant on February 16, 1897, began to operate regularly and permanently upon said permanent elevated railroad structure in front of plaintiff's said premises its passenger trains, drawn by steam locomotives.

"SIXTH.—That the rental and fee values of the plaintiff's said premises were damaged by the work of constructing said permanent elevated railroad structure and by the existence of the same from April, 1893, to March, 1896; also by said structure and the operation thereon of trains, as aforesaid, from March, 1896, to February 16, 1899, but that neither of said defendants is liable for such damage.

"SEVENTH.—That said permanent structure and the operation by said defendant, The New York Central and Hudson River Railroad Company, of passenger trains thereon since February 16th, 1897, are and have been a continuous trespass upon the plaintiff's easements of light and air appurtenant to his said premises, hereinbefore described as having a frontage of 76 feet and 10 inches on said Park avenue and a depth of 26 feet on 115th street; that solely in consequence of said trespass, and aside from any other causes, the rental and usable value of said premises was depreciated from February 16, 1897, down to October 10, 1900, in the sum of fourteen hundred dollars ($1,400) below what said rental value would have been during said period, if there had been no change in defendants' said railroad

in Park avenue in front of said premises pursuant to chapter 339 of the Laws of 1892; and that the fee value of said premises has been, and was on October 10, 1900, depreciated thereby in the sum of three thousand dollars ($3,000) below what said fee value would have been on said date if there had been no change in defendant's railroad as aforesaid.

"EIGHTH.—That the said sums awarded as damages are over and above any and all benefits conferred upon said premises by the changes made, pursuant to chapter 339 of the Laws of 1892, which said benefits result in part from improved access to said premises afforded by said changes, and are offset against the damages to said premises caused by said changes.

"NINTH.—That the said sums awarded as damages are exclusive of the damages that would have been occasioned to plaintiff's premises by the maintenance and use of the defendant's railroad and structures had there been no change in the same pursuant to chapter 339 of the Laws of 1892, for which last-mentioned damages the defendants are not liable either jointly or severally.

"TENTH.—That this action was commenced by the plaintiff on January 7, 1897, that the plaintiff on April 28, 1892, began an action in this court against the defendant for an injunction and damage by reason of the defendant's railroad structure and the operation of trains thereon in front of the premises described herein, as said railroad existed and was operated on said date; and that said last-mentioned action was discontinued on February 27, 1900."

A decree was entered enjoining the use of the railroad structure and its removal from in front of plaintiff's premises, but it was provided that the injunction should not become operative if the defendants' tender for the purpose of execution by the plaintiff "a form of conveyance and release" to them of the easements of light, air and access appurtenant to said premises, and tender further of the sum of $3,000, with interest thereon from October 10, 1900. Damages were also adjudged to plain-

tiff in the sum of $1,400, with interest from February 16, 1897, and cost. Either party was given the right to move at the foot of the decree for further directions as to the enforcement of the same.

In the form of the decision and judgment entered, and as to the legal principles involved, the court professed to follow *Lewis* vs. *New York & Hudson River Railroad* (162 N. Y., 202.)

The judgment was affirmed by the Appellate Division. It was reversed by the Court of Appeals, 173 N. Y. 549; and the judgment of that court, upon the remission of the case, was made the judgment of the Supreme Court and the complaint dismissed without costs. The case was then brought here.

Mr. Justice McKenna, after stating the case, announced the judgment of the Court and delivered the following opinion:

As we have observed, the Supreme Court followed *Lewis* v. *New York & Hudson River Railroad* (162 N. Y. 202), both in the "form of decision and judgment" and "the legal principles involved." Discussion was not considered necessary. The Appellate Division affirmed the judgment on the authority of the same case and other cases which had been ruled by it. The court, by brief expression, pointed out the identity of the cases and disposed of the defence made by the railroad companies of adverse possession as follows:

> "The question of defendants having acquired title by adverse possession was considered by this court in both the Fries and Sanders cases. In the former it was said: 'For these reasons the deed to the city was valid as against the railroad company, and it had no title to that part of the street in front of the plaintiff's premises, and its only rights, therefore, were

those which it had acquired by adverse possession. Within the rule laid down in the case of *Lewis* vs. *New York & Harlem R. R. Co.* (cited above), that adverse possession did not give to the railroad company the right to carry its tracks, which for twenty years had run in a cut, upon a viaduct such as this is above ground, in front of the plaintiff's premises. The case of Lewis applies fully to the one at bar.' In the Sanders case this court followed the decision just quoted, the presiding justice dissenting on the sole ground that 'Title by adverse possession as to the twenty-four feet strip, at least, was established by the evidence,''

In the case at bar there is a complete change of ruling by the Court of Appeals. The Lewis case is declared, in so far as it expressed rights of abutting property owners, to have have been improvidently decided, and the Elevated Railroad cases, which were made its support, were distinguished. The court rested its ruling on one point, the effect of the act of 1892, under which the structure complained of was erected, the court declaring that act a command to the railroad company in the interest of the public; indeed, made the State the builder of the new structure and the use of it by the railroads mere obedience to law. But it does not follow that private property can be taken either by the erection of the structure or its use. This was plainly seen and expressed in the Lewis case as to the use of the structure. It was there said: "When they (the railroads) commence to use the steel viaduct, they started a new trespass upon the rights of abutting owners." There was no hesitation then in marking the line between the power of the State and the duty of the railroad, and assigning responsibility to the latter. This was in accordance with principle. The command of the State, the duty of the railroad to obey, may encounter the inviolability of private property. And in perform-

ng the duties devolved upon it a railroad may be required to exercise the right of eminent domain (*Jacobson* v. *Wisconsin, Minn. & Pac. R. R.*, 179 U. S. 287); see also *Mayor and Aldermen of Worcester* v. *Norwich and Worcester R. R.* (109 Mass. 103). We do not, therefore, solve the questions in this case by reference to the power of the State and the duty of the railroads; the rights of abutting property owners must be considered, and against their infringement plaintiff urges the contract clause of the Constitution of the United States and the Fourteenth Amendment. The latter is invoked because the act of 1892 does not provide for compensation to property owners, and the former on account of the conditions upon which the strip of land constituting the avenue was conveyed to the city. There were two deeds to the city, one made in 1825 and the other in 1827. That of 1825 was stated to be "in trust, nevertheless, that the same be appropriated and be kept open as parts of public streets and avenues forever, in like manner as the other public streets and avenues in said city are and of right ought to be." The deed of 1827 was also "in trust that the same be left open as public streets for the use and benefit of the inhabitants of said city forever." Plaintiff derives title from Poillon, grantor of the city in the deed of 1827, and hence contends that he is entitled to enforce the trust created by Poillon's deed to the city. The railroads oppose this contention. They assert title to the land upon which the structure complained of stands by deed and by prescription. The details of these contentions we need not repeat nor discuss. They are stated at length in the Lewis case, and the conclusions there expressed are not disturbed by the decision of the Court of Appeals in the case at bar. The case is therefore presented to us as to the effect of the deed of Poillon to the plaintiff and to the city as constituting a contract, and the effect of the act of 1892 as an impairment of that contract or as taking plaintiff's prop-

erty without due process of law. These questions were directly passed on and negatived by the Court of Appeals.

It will be observed from the statement of facts that before the construction of the viaduct complained of the railroad ran partly on the surface of the street and partly in a cut or trench, the latter being flanked by masonry walls three feet high. The viaduct is a solid roadbed thirty-one feet above the surface, having iron girders on the sides and in the middle, and supported by iron columns, of which there are six in front of the plaintiff's land. The old construction prevented crossing or access to the tracks. The new construction impairs or destroys the plaintiff's easements of light and air. And such easements the trial Court found belonged to plaintiff in common with other abutters upon the public streets of New York and his damages for their impairment to be, as expressed by Bartlett, *J.*, in his dissenting opinion, "$3,000 fee damages, $1,400 rental damages, from February 16, 1897, to October 10, 1900," the date of trial, that is, $4,400 present damage. It is suggested, however, that the Court of Appeals did not deny the rights of the abutters, but considered that the most important phase of those rights was that of access, and the plaintiff did not have this over the railroad by reason of the stone wall. The basis of the suggestion, as we understand, is the idea that plaintiff was compensated for the injury of his easements of light and air by an increase of his easement of access without regard to the resulting damage. To do this, however, is to make one easement depend upon another, both of which are inseparable attributes of property and equally necessary to its enjoyment. It is impossible for us to conceive of a city without streets, or any benefit in streets, if the property abutting on them has not attached to it as an essential and inviolable part, easements of light and air as well as of access. There is something of mockery

to give one access to property which may be unfit to live on when one gets there. To what situation is the plaintiff brought? Because he can cross the railroad at more places on the street, the State, it is contended, can authorize dirt, cinders and smoke from 200 trains a day to be poured into the upper windows of his house.

In *Barnett* v. *Johnson* (15 N. J. Eq. 481), there is a clear expression of the right of abutting owners to light and air, and of the common practice and sense of the world upon which it is founded. "It is a right," the court said, "founded in such an urgent necessity that all laws and legal proceedings take it for granted. A right so strong that it protects itself, so urgent that, upon any attempt to annul or infringe it, it would set at defiance all legislative enactments and all judicial decisions." And, graphically describing the right, observed further, "Is not every window and every door in every house in every city, town and village the assertion and maintenance of this right?" It has been said *Barnett* v. *Johnson* anticipated "the principle upon which compensation was at last secured in the Elevated Railroad cases in New York." (1 Lewis Eminent Domain, 183.)

It is manifest that easements of light and air cannot be made dependent upon the easement of access, and whether they can be taken away in the interest of the public under the conditions upon which the city obtained title to the streets is now to be considered. The answer depends upon the cases of *Story* vs. *New York Elevated R.R. Co.* (90 N. Y., 122) and *Lahr* vs. *Metropolitan Elevated R.R. Co.* (104 N. Y., 268), known as the Elevated Railroad cases. The Lahr case was decided in 1887. The plaintiff in the case at bar acquired title to his property in 1888.

The first of the Elevated Railroad cases was the Story case, decided in 1882. The plaintiff in the case was the owner of a lot on the corner of Moore and Front Streets in the City of New York, on which there were buildings.

To their enjoyment light, air and access were indispensable, and were had through Front Street. The defendant was about to construct a railroad above the surface of that street upon a series of columns, about fifteen inches square, fourteen feet and six inches high, placed five inches inside of the sidewalk, with girders from thirty-three to thirty-nine inches deep, for the support of cross ties for three sets of rails for a steam railroad. The cars were to be of such a construction as to reach within nine feet of plaintiff's buildings, and trains were to be run every three minutes, and at a rate of speed as high as eighteen miles an hour.

The fact of injury to the abutting lot was found by the trial court, and also that the city of New York was the owner in fee of Front Street, opposite plaintiff's lots, and that he was not and never had been seized of the same in fee nor had any estate therein.

The Supreme Court said the case involved the question whether the scheme of the defendant amounted to the taking of any property of the plaintiff; if it did, it was said, the judgment was invalid, on the ground that the intended act, when performed, would violate not only the provision of the Constitution, which declared that such property should not be taken without just compensation, but certain statutes by which defendant was bound or owed its existence, and which would not have been upheld unless, in the opinion of the court, they had provided means to secure such compensation.

The plaintiff contended that, as owner of the abutting premises, he had the fee to one-half of the bed of the street opposite thereto, and he also contended, if the fee was in the city, he, as abutting owner, had such right to have light and access afforded by the street above the roadbed as entitled him to have it kept open for those uses until by legal process and upon just compensation

that right was taken away. The defendant justified its intended acts through the permission of the city. The issue thus made the court passed on, and in doing so assumed that the city owned the fee of the street and that the plaintiff derived his title from the city. It was held that the plaintiff had acquired "the right and privilege of having the street forever kept open as such;" and that the right thus secured was an incorporeal hereditament, which "became at once appurtenant to the lot and formed an 'integral part of the estate' in it," and which followed the estate and constituted a perpetual encumbrance upon the land burdened with it. "From the moment it attached," the court observed, "the lot became the dominant and the open way or street the servient tenement." Cases were cited for these propositions. And the extent of the easement was defined to be not only access to the lot, but light and air from it. The court said: "The street occupies the surface, and to its uses the rights of the adjacent lots are subordinate, but *above the surface* there can be no lawful obstruction to the access of light and air, to the detriment of the abutting owner." And further: "The elements of light and air are both to be derived from the space *over* the land on the *surface* of which the street is constructed and which is made servient for that purpose." This was emphasized, the court observing: "Before any interest passed to the city the owner of the land had from it the benefit of air and light. *The public purpose of a street requires of the soil the surface only.*" The easement was declared to be property and within the protection of the constitutional provision for compensation for its diminution by the contemplated structure.

It is, of course, impossible to reproduce the argument of the court by which its conclusions were sustained. It is enough to say that a distinction was clearly made between the rights of abutting owners in the *surface* of the

street and their rights in the *space above* the street, and the distinction was also clearly made between damages and a taking. A review was made of the cases upon which those distinctions rested. The power of a city to alter a grade of a street was adverted to, and held not to justify the intended structure. There was no change in the street surface intended, it was said, "but the elevation of a structure useless for street purposes and as foreign thereto," as the house which was held to be an obstruction in *Corning* vs. *Lowerre* (6 Johns. Ch., 439), or the freight depot in *Barney* vs. *Keokuk* (94 U. S., 324).

The conclusion of the Court and the distinctions made by it were repeated in *Lahr* vs. *Metropolitan Elevated R.R. Co.* (104 N. Y., 271). The structure complained of in the latter case was also an elevated railroad.

Chief Judge Ruger, speaking for the court, opened his opinion by observing that the action was "the sequel of the Story case," and that its defense seemed to have been conducted upon the theory of endeavoring to secure a re-examination of that case. The endeavor, it was said, must fail, because the doctrine of the Story case had been pronounced after most careful and thorough consideration and after two arguments at the bar, made by most eminent counsel, had apparently exhausted the resources of learning and reasoning in the discussion of the question presented. And it was declared that "it would be the occasion of great public injury if a determination thus made could be inconsiderately unsettled and suffered again to become the subject of doubt and theme of renewed discussion." The doctrine of the Story case was declared to be *stare decisis*, not only upon all the questions involved, but upon all that came logically within the principles decided. There was an enumeration of those principles, as follows:

(1) That an elevated railroad, of the kind described, was a perversion of the use of a street, which neither the

city nor the legislature could legalize without providing compensation for the injury inflicted upon the property of abutting owners.

(2) That abutters upon a public street, claiming title by grant from the municipal authorities, which contained a covenant that streets which could be laid out should continue as other streets, acquired an easement in the bed of the street for ingress and egress to and from their premises, and also for the free and uninterrupted passage and circulation of light and air through and over such street for the benefit of the property situated thereon.

(3) That such easement was an interest in real estate and constituted property, within the meaning of the Constitution of the State, and could not be taken for a public use without payment of compensation.

(4) That an elevated railroad, upon which cars propelled by steam engines which generated gas, steam and smoke and distributed in the air cinders, dust, ashes, and other noxious and deleterious substances, and interrupted the free passage of light and air to and from adjoining premises, constituted a taking of the easement, and rendered the railroad company liable for the damages occasioned by such taking.

The application of these principles was resisted on the ground that the city was the grantor of the plaintiff in the Story case and could not derogate from the title a property it conveyed, and it was contended that the case went off on that ground. This was rejected and the principles enumerated held to apply, notwithstanding the land in the street had been taken from plaintiff's grantor by proceedings *in invitum*. And rights of abutting owners were held to rest in contract constituted by the conditions upon which the city received the property.

[illegible] untenable are the grounds of distinction urged

in the case at bar against the application of those principles. What are they? In the Story and Lahr cases the railroads were imposed for the first time on the street. In the case at bar the Harlem railroad had occupied the surface of the street, and was changed to the viaduct. But in the Story and Lahr cases it was not the fact that the railroads were imposed on the street for the first time that determined the judgment rendered. It was the fact that trains were run upon an elevated structure, interrupting the easements of light and air of the abutting owners. It was this that constituted a use inconsistent with the purpose of the street. It was the "elevation of a structure," to quote again from the Story case, "useless for general street purposes." This situation of the railroad was especially dwelt upon in the Story case, and that case was distinguished thereby from the Surface Railway cases. And in the Lewis case a difference was recognized between the two situations and a balance struck between damage done by the railroad in one situation and the railroad in the other situation. The Lewis case, we have seen, was overruled by the Court of Appeals in the case at bar, while the Story and Lahr cases were said not to be in point. We think that the Lewis case was an irresistible consequence of the others, and the Story and Lahr cases are in point and decisive.

Another distinction is claimed, as we have already observed, between the case at bar and those cases. The act of the railroad in occupying the viaduct, it is said, was the act of the State. But this defence was made in the other cases. It did not give the court much trouble. It is urged, however, now, with an increased assurance. Indeed, it is made the ground of decision, as we have seen by the Court of Appeals. The court said: "The decisions in the Elevated Railroad cases are not in point. There no attempt was made by the State to improve the street for the benefit of the public. Instead, it granted to a corpo-

ration the right to make an additional use of the street, in the doing of which it took certain easements belonging to abutting owners, which it was compelled to compensate them for." And, further, making distinction between those cases and that at bar, said: "The State could not if it would — and probably would not if it could —deprive defendant of its rights to operate its trains in the street. But it had the power in the public interest to compel it to run its trains upon a viaduct instead of in the subway." And the court concluded that it was the State, not the railroads, who did the injury to plaintiff's property. The answer need not be hesitating. The permission, or command of the State, can give no power to invade private rights, even for a public purpose without payment of compensation; and payment of such compensation, when necessary to the performance of the duties of a railroad company, may be, as we have already observed, part of its submission to the command of the State. The railroads paid one-half of the expense of the change, "by the command of the statute, and hence under compulsion of law," to quote from the Court of Appeals. The public interest therefore, is made too much of. It is given an excessive, if not a false quantity. Its use as a justification is open to the objection made at the argument; it enables the State to do by two acts that which would be illegal if done by one. In other words, as under the law of New York the State can authorize a railroad to occupy the surface of a street it can subsequently permit or order the railroad to raise its tracks above the street and justify the impairment of property rights by the public interest. It was said in the Story case that "the public purpose of a street requires of the soil the surface only." And this was followed in *Fobes* v. *R. W. & O. R. Co.* (121 N. Y. 505), where a steam railroad was permitted upon a street without liability for consequen-

tial damages to adjoining property. The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the Elevated Railroad cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

And this is the ground of our decision. We are not called upon to discuss the power or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of State decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so is too intangible to estimate. We certainly can estimate the difference between a building with full access of light and air and one with those elements impaired or polluted. But we have already expressed this. We need only add that the right of passage is not all there is to a street, and to call it the primary right is more or less delusive. It is the more

conspicuous right, has the importance and assertion of community interest and ownership, properly has a certain dominance, but it is not more necessary to the making of a city than the rights to light and air, held, though the latter are, in individual ownership and asserted only as rights of private property. The true relation and subordination of these rights, public and private, is expressed, not only by the Elevated Railroad cases, but by other cases. They are collected in 1 Lewis Eminent Domain, section 91*c*, and it is there said, "established beyond question the existence of these rights, or easements of light, air and access, as appurtenant to abutting lots, and that they are as much property as the lots themselves."

Judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Mr. Justice BROWN concurs in the result.

True copy.

Test:

[SEAL.] JAMES H. MCKENNEY,
Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 99.—October Term, 1904.

Henry Muhlker, Plaintiff in Error, *vs.* The New York and Harlem Railroad Company and The New York Central and Hudson River Railroad Company.	In error to the Supreme Court of the State of New York.

[April 10, 1905.]

Mr. Justice Holmes dissenting.

I regret that I am unable to agree with the judgment of the Court, and as it seems to me to involve important principles I think it advisable to express my disagreement and to give my reasons for it.

The plaintiff owns no soil within the limits of the avenue. The New York and Harlem Railroad Company at the time of the change was and long had been the owner, and the other defendant was the lessee of a railroad with four tracks along the middle of Park avenue, in front of the plaintiff's land, at the south end being at the surface of the avenue, and at the north in a trench about four feet and a half deep, the railroad being bounded on both sides by a masonry wall three feet high, which prevented crossing or access to the tracks. This is the finding

of the Court of first instance, and I take it to be binding upon us. We have nothing to do with the evidence. I take it to mean the same thing as the finding in *Fries* v. *New York & Harlem R.R.*, 169 N. Y. 270, that the defendants had "acquired the right without liability to the plaintiff to have, maintain and use their railroad and railroad structures as the same were maintained and used prior to February 16, 1897." The material portion of the decision of the Court of Appeals is that on this state of facts, as was held in the similar case of *Fries* v. *New York & Harlem R.R.*, the plaintiff had no property right which was infringed in such a way as to be anything more than *damnum absque injuria*. The finding that the railroad had the right to maintain the former structures was held to distinguish the case from the Elevated Railroad cases, where pillars were planted in the street without right as against the plaintiff. *Story* v. *New York Elevated R.R.*, 90 N.Y. 122, 160, 170, 178. *Lahr* v. *Metropolitan Elevated Ry.*, 104 N.Y. 268. The other so-called finding, that the new structure infringes the plaintiff's right, is merely a ruling of law that notwithstanding the facts specifically found the plaintiff has a cause of action by reason of his being an abutter upon a public street.

The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the Courts, deduced by way of consequence from dedication to and trusts for the purposes of a public street. They never were granted to him or his predecessors in express words, or, probably, by any conscious implication. If at the outset the New York Courts had decided that apart from statute or express grant the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. It would have been very possible to distinguish between the practical commercial advantage of the expecta-

tion that a street would remain open and a right *in rem* that it should remain so. See *Stanwood* v. *Malden*, 157 Mass. 17. Again, more narrowly, if the New York Courts had held that an easement of light and air could be created only by express words, and that the laying out or dedication of a street, or the grant of a house bounding upon one, gave no such easement to abutters, they would not have been alone in the world of the common law. *Keats* v. *Hugo*, 115 Mass. 204, 216. The doctrine that abutters upon a highway have an easement of light and air is stated as a novelty in point of authority in *Barrett* v. *Johnson*, 15 N. J. Eq. 481, 489, and that case was decided in a State where it was held that a like right might be acquired by prescription. *Robeson* v. *Pittenger*, 1 Green Ch. 57.

If the decisions, which I say conceivably might have been made, had been made as to the common law, they would have infringed no rights under the Constitution of the United States. So much, I presume, would be admitted by every one. But if that be admitted, I ask myself what has happened to cut down the power of the same Courts as against that same Constitution at the present day. So far as I know the only thing which has happened is that they have decided the Elevated Railroad cases, to which I have referred. It is on that ground alone that we are asked to review the decision of the Court of Appeals upon what otherwise would be purely a matter of local law. In other words, we are asked to extend to the present case the principle of *Gelpcke* v. *Dubuque*, 1 Wall. 175, and *Louisiana* v. *Pilsbury*, 105 U. S. 278, as to public bonds bought on the faith of a decision that they were constitutionally issued. That seems to me a great, unwarranted and undesirable extension of a doctrine which it took this Court a good while to explain. The doctrine now is explained, however, not to mean that a change in the decision impairs the obligation of contracts,

Burgess v. *Seligman*, 107 U. S. 20, 34; *Stanly County* v. *Coler*, 190 U. S. 437, 444, 445, and certainly never has been supposed to mean that all property owners in a State have a vested right that no general proposition of law shall be reversed, changed or modified by the Courts if the consequence to them will be more or less pecuniary loss. I know of no constitutional principle to prevent the complete reversal of the Elevated Railroad cases to-morrow, if it should seem proper to the Court of Appeals. See *Central Land Co.* v. *Laidley*, 159 U. S. 103.

But I conceive that the plaintiff in error must go much further than to say that my last proposition is wrong. I think he must say that he has a constitutional right not only that the State Courts shall not reverse their earlier decisions upon a matter of property rights, but that they shall not distinguish them unless the distinction is so fortunate as to strike a majority of this court as sound. For the Court of Appeals has not purported to overrule the Elevated Railroad cases. It simply has decided that the import and the intent of those cases does not extend to the case at bar. In those cases the defendants had impaired the plaintiff's access to the street. It is entirely possible and consistent with all that they decided to say now that access is the foundation of the whole matter; that the right to light and air is a parasitic right incident to the right to have the street kept open for purposes of travel, and that when, as here, the latter right does not exist the basis of the claim to light and air is gone.

But, again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropriation of the street to the uses of the public. The legislature and the Court of Appeals of New York have said that the statute assailed was passed for the benefit of the public using the street, and I accept their view. The most obvious aspect of the change is that the whole street now

is open to travel, and that an impassable barrier along its width has been removed; in other words that the convenience of travellers on the highway has been considered and enhanced. Now still considering distinctions which might be taken between this and the earlier cases, it was possible for the New York Courts to hold, as they seem to have held, that the easement which they had declared to exist is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right, as against what I have called the parasitic right which the plaintiff claims. *Scranton* v. *Wheeler*, 179 U. S. 141. *Gibson* v. *United States*, 166 U. S. 269.

The foregoing distinctions seem to me not wanting in good sense. Certainly I should have been inclined to adopt one or both of them, or in some way to avoid the earlier decisions. But I am not discussing the question whether they are sound. If my disagreement was confined to that I should be silent. I am considering what there is in the Constitution of the United States forbidding the Court of Appeals to hold them sound. I think there is nothing; and there being nothing, and the New York decision obviously not having been given its form for the purpose of evading this Court, I think we should respect and affirm it, if we do not dismiss the case.

What the plaintiff claims is really property, a right *in rem*. It is called contract merely to bring it within the contract clause of the Constitution. It seems to me a considerable extension of the power to determine for ourselves what the contract is, which we have assumed when it is alleged that the obligation of a contract has been impaired, to say that we will make the same independent determination when it is alleged that property is taken without due compensation. But it seems to me that it does not help the argument. The rule adopted as to contract is simply a rule to prevent an evasion of the constitutional

limit to the power of the States, and, it seems to me, should not be extended to a case like this. Bearing in mind that, as I have said, the plaintiff's rights, however expressed, are wholly a construction of the Courts, I cannot believe that whenever the Fourteenth Amendment or Article 1, Section 10, is set up we are free to go behind the local decisions on a matter of land law, and, on the ground that we decide what the contract is, declare rights to exist which we should think ought to be implied from a dedication or location if we were the local Courts. I cannot believe that we are at liberty to create rights over the streets of Massachusetts, for instance, that never have been recognized there. If we properly may do that, then I am wrong in my assumption that if the New York Courts originally had declared that the laying out of a public way conferred no private rights we should have had nothing to say. But if I am right, if we are bound by local decisions as to local rights in real estate, then we equally are bound by the distinctions and the limitations of those rights declared by the local Courts. If an exception were established in the case of a decision which obviously was intended to evade constitutional limits, I suppose I may assume that such an evasion would not be imputed to a judgment which four Justices of this Court think right.

As I necessarily have dealt with the merits of the case for the purpose of presenting my point, I will add one other consideration. Suppose that the plaintiff has an easement and that it has been impaired, bearing in mind that his damage is in respect of light and air, not access, and is inflicted for the benefit of public travel, I should hesitate to say that in inflicting it the legislature went beyond the constitutional exercise of the police power. To a certain and to an appreciable extent the legislature may alter the law of nuisance, although property is affected. To a certain and to an appreciable extent the use of particular property may be limited without compensation.

Not every such limitation, restriction or diminution of value amounts to a taking in a constitutional sense. I have a good deal of doubt whether it has been made to appear that any right of the plaintiff has been taken or destroyed for which compensation is necessary under the Constitution of the United States. *Scranton* v. *Wheeler*, 179 U. S. 141. *Meyer* v. *Richmond*, 172 U. S. 82. See *Mugler* v. *Kansas*, 123 U. S. 623, 668. *Merchant* v. *Pennsylvania R. R.*, 153 U. S., 380. *Canfield* v. *United States*, 167 U. S. 518, 523. *People* v. *D'Oench*, 111 N. Y. 359, 361. *Sawyer* v. *Davis*, 136 Mass. 239. *Commonwealth* v. *Alger*, 7 Cush. 53. Compare *United States* v. *Lynah*, 188 U. S. 445, 470.

I am authorized to say that the CHIEF JUSTICE, Mr. Justice WHITE and Mr. Justice PECKHAM concur in the foregoing dissent.

True copy.

Test:

Clerk Supreme Court, U. S.